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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DENNIS MONTGOMERY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
ETREPPID TECHNOLOGIES, INC.,	)	
et al.,	)	
	)	
Defendants.	)	

3:06-CV-00056-PMP-VPC  
**BASE FILE**

3:06-CV-00145-PMP-VPC

**NOTICE OF EMERGENCY MOTION AND MOTION FOR  
RECONSIDERATION BY THE UNITED STATES**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Please take notice that the United States Department of Defense (DoD), hereby submits its emergency motion for reconsideration of the Court's March 19, 2007 Order to prevent the possible unauthorized disclosure of classified information protected by the state secrets privilege. The motion is based on this notice of motion and motion and the following memorandum of points and authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF UNITED STATES' EMERGENCY MOTION FOR RECONSIDERATION**

In its March 19, 2007 Order, the Court granted plaintiffs' Federal Rule of Criminal Procedure 41(g) motion to unseal search warrant affidavits and return seized property. During the pendency of the proceedings relating to the Rule 41(g) motion, the Court had ordered that the filings be made under seal, as a result of which neither counsel for eTreppid nor the United States in the civil litigation has previously reviewed the documents filed in the return of property proceedings. The March 19 Order provides that the filings made in the Rule 41(g) action shall be unsealed unless, for good cause shown, the Court determines that a particular filing, declaration, or exhibit is privileged. March 19, 2007 Order at 17. Acknowledging that both the United States and eTreppid had filed motions for protective orders, the Court has provided the parties with 21 days to review the sealed case file and to file with the Court any objection to the unsealing of any portion of the record. *Id.*

On September 25, 2006, the United States moved for a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent the disclosure of information relating to (1) the existence or non-existence of any actual or proposed relationship, agreement, connection, contract, transaction, communication, or meeting of any kind between an intelligence agency as defined in 50 U.S.C. § 401(a)(4), which includes intelligence elements of the military services; and (2) any actual or proposed interest in, application, or use by any intelligence agency, or any current or former official, employee, or representative thereof, of any technology, software, or source code owned or claimed by any individuals or entities associated with these lawsuits. The basis for the protective order was that such information is protected by the military and state secrets privilege. As explained in the Declaration of John D. Negroponte (Exhibit 1 to the Motion for Protective Order), because the disclosure of information at issue in this litigation reasonably could be expected to cause serious, and in some cases exceptionally grave, damage to national security, the United States' interest in preserving its state secrets is overriding and must

1 be safeguarded, even if a party is thereby precluded from establishing its legal position in these  
2 cases.

3         Notwithstanding this overriding and compelling interest of the United States, the Court's  
4 March 19 Order requires the simultaneous review of the filings in the return of property  
5 proceedings by counsel for the United States and for eTreppid. To the extent that the filings in  
6 the return of property matter contain information that is classified, the timing of the review could  
7 result in the unauthorized disclosure of information covered by the state secrets privilege and,  
8 thus, could reasonably be expected to cause serious, if not exceptionally grave, harm to national  
9 security. Counsel for eTreppid and Montgomery do not possess security clearances and have not  
10 been authorized to access the classified information that may be at issue in this litigation  
11 (including information that may have been included in filings made during the course of the  
12 litigation pertaining to the return of property). Consequently, if the simultaneous review were to  
13 proceed as ordered, there could be an unauthorized disclosure of the precise information subject  
14 to state secrets privilege, which the government has sought to protect by filing the motion for  
15 protective order.

16         Given these factors, the government moves for reconsideration of the March 19 Order.  
17 The government's interest in protecting national security is paramount. In order to ensure that an  
18 unauthorized disclosure does not occur, the government must review the sealed documents first,  
19 prior to their review by the other parties, for purposes of determining whether information  
20 covered by the state secrets privilege, as asserted in this case, is implicated. Such review must be  
21 undertaken by personnel who possess the appropriate security clearances with respect to the  
22 privileged information at issue. The government recognizes, however, that others have  
23 significant interests in reviewing the sealed materials and that it is advisable to allow the  
24 litigation to proceed in an expeditious manner. Government counsel of record in the civil  
25 litigation will be unavailable from March 28-April 9, 2007, because of long-scheduled travel  
26 outside of the country. Nevertheless, the government will ensure that the review process, as  
27  
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1 outlined below, will not be delayed due to her absence by having other officials with the  
2 appropriate clearances undertake and complete the process of identifying any information that is  
3 subject to the state secrets privilege as asserted, and providing redacted versions of the pertinent  
4 documents for substitution and filing with the Court by April 9, 2007.

5 The United States requests the Court to adopt the following process for review:

6 1. Authorized representatives of the United States, not limited to its counsel, who have  
7 the level of clearance necessary to review information covered by the state secrets privilege as  
8 asserted in this litigation, will review all material in the sealed case file referenced in this Court's  
9 March 19 Order, and any filings or material placed under seal in the related civil actions,  
10 including the declaration of Dennis Montgomery referenced in this Court's Order. The review  
11 will be for the purpose of determining whether any documents contain information that is  
12 protected by the state secrets privilege.

13 2. Neither the other parties nor their counsel may review the above-referenced sealed  
14 documents until after the United States government review has been completed.

15 3. With respect to those documents for which the state secrets privilege is implicated, the  
16 United States government official(s) will:

17 a. Inform the Clerk's office of the identity of the pertinent documents and request  
18 that the Clerk's office remove those documents from the sealed case file and store the  
19 documents, under the control and supervision of the Court, in accordance with government-  
20 approved security procedures for classified information.

21 b. Make a copy of the documents to be transported to an appropriate facility for a  
22 classification review by an original classification authority.

23 c. Provide the Court with a redacted, unclassified copy of the documents which  
24 contained information protected by the state secrets privilege, to be filed with the Court and  
25 substituted for the original documents in the record. Such review, redaction, and return of the  
26 documents for substitution and filing will be completed by April 9, 2007.

1 4.. After the redacted documents have been substituted for the originals and filed in the  
2 record, they may be reviewed by counsel for eTreppid and Montgomery.

3 5. With respect to those filings for which the state secrets privilege **is not** implicated, the  
4 United States has no objection to their review after the review provided for in paragraph 1 has  
5 been completed.

6 The above process will prevent the unauthorized disclosure of classified national security  
7 information protected by the state secrets privilege and permit the unsealing of information in a  
8 timely manner to the extent that such disclosure is not precluded by law.

9 **CONCLUSION**

10 For the foregoing reasons, the United States' emergency motion for reconsideration  
11 should be granted.

12 DATED: March 21, 2007

13 Respectfully submitted,

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23 /s/ Carlotta P. Wells  
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20 Massachusetts Ave., NW  
26 P.O. Box 883  
Washington, D.C. 20044

Counsel for United States  
Department of Defense

IT IS SO ORDERED

Date: \_\_\_\_\_, 2007

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee in the office of the United States Department of Justice, Civil Division in Washington DC and I am of such age and discretion as to be competent to serve papers. On March 21, 2006, I electronically filed the United States' Notice of Emergency Motion and Motion for Reconsideration, with the accompanying Memorandum of Points and Authorities. Service was effected through the Court's electronic filing and service system upon the following:

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**PROPOSED ORDER**

Upon consideration of the United States' Emergency Motion for Reconsideration, it is hereby

ORDERED that the review of the sealed documents referenced in the Court's March 19, 2007 Order shall proceed in the manner set forth below:

1. Authorized representatives of the United States, not limited to its counsel, who have the level of clearance necessary to review information covered by the state secrets privilege as

1 asserted in this litigation, shall review all material in the sealed case file referenced in this  
2 Court's March 19 Order, and any filings or material placed under seal in the related civil actions,  
3 including the declaration of Dennis Montgomery referenced in this Court's Order. The review  
4 will be for the purpose of determining whether any documents contain information that is  
5 protected by the state secrets privilege.

6 2. Neither the other parties nor their counsel shall review the above-referenced sealed  
7 documents until after the United States government review has been completed.

8 3. With respect to those documents for which the state secrets privilege **is** implicated, the  
9 United States government official(s) will:

10 a. Inform the Clerk's office of the identity of the pertinent documents and request  
11 that the Clerk's office remove those documents from the sealed case file and store the  
12 documents, under the control and supervision of the Court, in accordance with government-  
13 approved security procedures for classified information.

14 b. Make a copy of the documents to be transported to an appropriate facility for a  
15 classification review by an original classification authority.

16 c. Provide the Court with a redacted, unclassified copy of the documents which  
17 contained information protected by the state secrets privilege, to be filed with the Court and  
18 substituted for the original documents in the record. Such review, redaction, and return of the  
19 documents for substitution and filing will be completed by April 9, 2007.

20 4. After the redacted documents have been substituted for the originals and filed in the  
21 record, they may be reviewed by counsel for eTreppid and Montgomery.

22 5. With respect to those filings for which the state secrets privilege **is not** implicated,  
23 counsel for eTreppid and Montgomery may review after the review provided for in paragraph 1  
24 has been completed.



1 IT IS SO ORDERED

2 Date: \_\_\_\_\_, 2007

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3 UNITED STATES DISTRICT JUDGE  
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